

(2)
No. 89-649

Supreme Court, U.S.

FILED

JAN 17 1990

JOSEPH E. SPANIOLO, JR.,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

FRANKLYN ARANGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the search of a Jeep that petitioner occupied immediately before his arrest was validly conducted incident to that arrest.

2. Whether the district court abused its discretion in remedying a Speedy Trial Act violation by dismissing petitioner's indictment without prejudice.

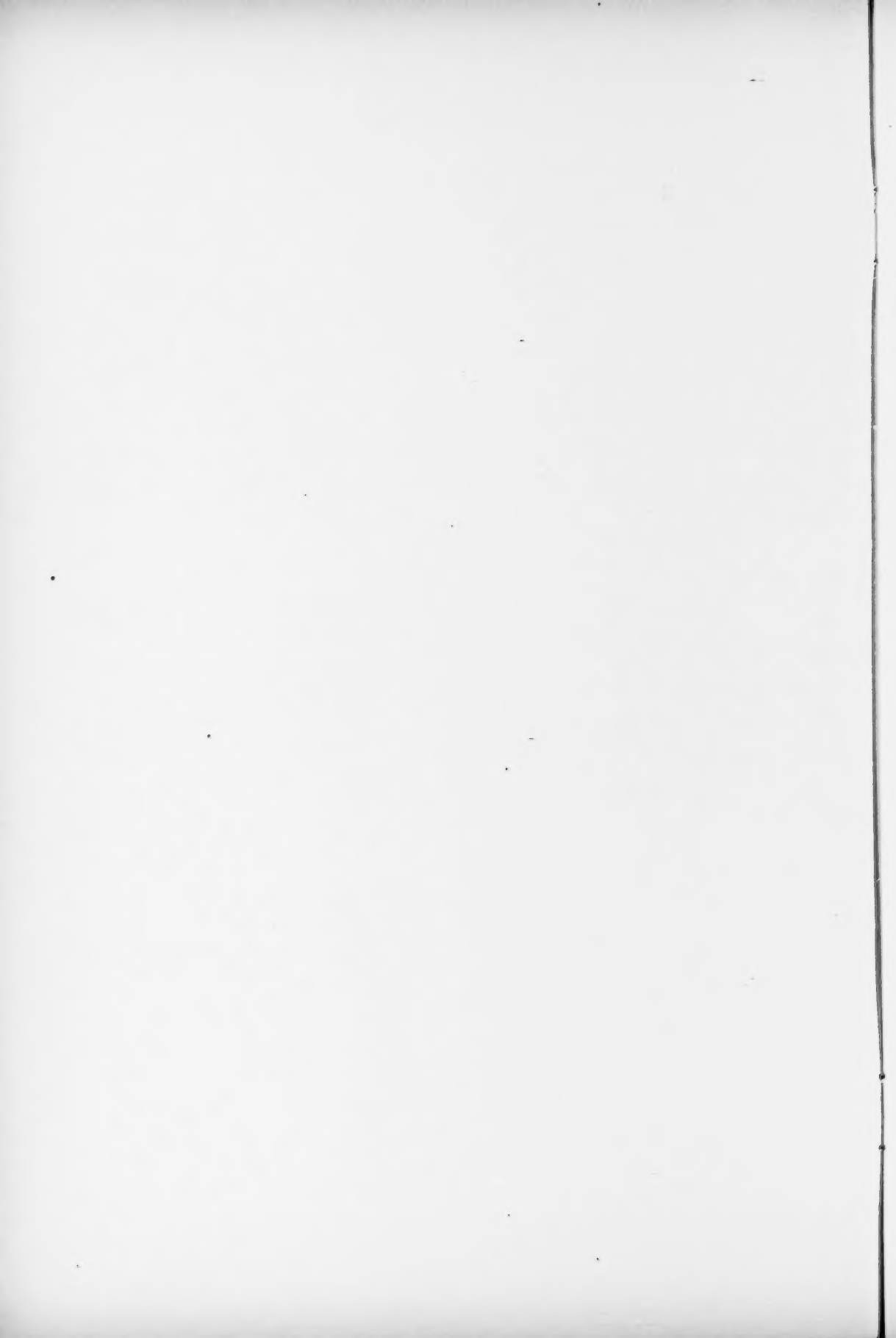


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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 879 F.2d 1501.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1989. The petition for a writ of certiorari was filed on September 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted

of possession of 3438.9 grams of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); conspiracy to possess cocaine, in violation of 21 U.S.C. 846; and assaulting a federal officer, in violation of 18 U.S.C. 111. He was sentenced to concurrent terms of 10 years' imprisonment to be followed by 10 years' supervised release on the narcotics counts, and five years' probation on the assault count.

1. On October 29, 1987, two Drug Task Force officers were investigating narcotics trafficking on the north side of Chicago. While on patrol, the officers received a radio message that a white Jeep Cherokee without license plates had been seen in the area; soon thereafter, the officers saw a Jeep fitting that description and began to follow it. After the officials had followed the Jeep for about nine blocks, the Jeep pulled over and two men got out. Petitioner, the passenger, and Tony Maldonado, the driver, were both wearing digital beepers that were activated, indicating incoming calls. Pet. App. A2; Gov't C.A. Br. 5-6.

The officers approached the two men, identified themselves as police officers, and asked for identification. Maldonado gave the officers a driver's license and the keys to the Jeep, but said he did not know who owned it. Petitioner told the officers that he had no identification. The officers frisked Maldonado and found \$2,200 in his jacket pocket. Detective Clifford Berti then looked into the Jeep, saw a wallet on the seat where petitioner had been sitting, and opened the door of the Jeep to retrieve it. While Detective Berti was doing that, Sergeant Thomas Martin recognized petitioner as a suspect in a recent narcotics-related shooting, and asked him whether the police were still looking for him. Petitioner immediately shoved Sergeant Martin to the ground, breaking Martin's kneecap, and fled with Maldonado. Two nearby uniformed police officers gave chase, and petitioner was caught about one block away. Detective Berti arrested petitioner for assaulting a police

officer and conducted a pat-down search. The officers immediately brought petitioner back to Sergeant Martin, who was lying on the street and in need of medical assistance. Pet. App. A2-A3; Gov't C.A. Br. 5-7.

Detective Berti then conducted a more thorough search of petitioner's person and found \$3,800 in cash and car keys. Berti also searched the Jeep and found \$16,000, a package of cocaine on the back seat, and several documents bearing petitioner's name in the glove compartment. The officers drove the Jeep to the DEA garage in Chicago, where they searched it again. That search turned up four packages of cocaine in a secret compartment underneath the carpeting. Pet. App. A4.

2. Petitioner moved to suppress the evidence found in the Jeep. After holding a hearing on March 8, 9, and 17, 1988, the court denied petitioner's motion on July 15, 1988. The court held that the arrest-scene search of the Jeep was justified as a search incident to petitioner's arrest. The court also held that upon petitioner's arrest, the officers had a right to secure the Jeep and to inventory its contents. Having found cocaine in the Jeep, the court added, the officers had probable cause to search the Jeep thoroughly. Gov't C.A. Br. 2; C.A. App. 78-83.

On August 9, 1988, petitioner filed a motion to dismiss the indictment for a violation of the Speedy Trial Act. Because the 70-day time limit of the Act had been exceeded by 72 days, the district court granted petitioner's motion. The court, however, ruled that the dismissal would be without prejudice. Applying the factors set forth in 18 U.S.C. 3162(a)(1), the court explained that the narcotics charge involved "a significant amount of cocaine and was serious"; the government was not at fault in the delay, which resulted from the district court's misunderstanding of the status of certain motions; and the reprosecution of petitioner was consistent with the purposes of the Speedy Trial Act

and the administration of justice. Petitioner waived indictment and was convicted by a jury on all counts. Pet. App. A4, A12; C.A. App. 38.

3. The court of appeals affirmed. The court held that under *New York v. Belton*, 453 U.S. 454 (1981), the search of the Jeep upon petitioner's arrest was lawfully conducted incident to that arrest. The court rejected petitioner's argument that the officers could not search the passenger compartment of the Jeep because petitioner was arrested nearly one block away. The court explained that "under the specific facts of this case, * * * the search of the vehicle as incident to an arrest was entirely reasonable," because petitioner was apprehended following his flight from the scene of Sergeant Martin's assault and the officers had a "legitimate reason and a pressing need to return petitioner to the scene of the assault immediately," to attend to Martin's injuries. Once petitioner was put "in proximity to the jeep," the court reasoned, the search of the Jeep was appropriate under *Belton* "to protect all persons as well as evidentiary items." Pet. App. A8-A9. Alternatively, the court held, even if the arrest-scene search was improper, the cocaine would have been inevitably discovered during a subsequent inventory search, which was conducted at the DEA garage after the impoundment of the Jeep. *Id.* at A10-A11 n.2.

The court of appeals also affirmed the district court's dismissal of the indictment without prejudice. The court stated that in determining the appropriate remedy for the Speedy Trial Act violation, the district court had properly applied the factors listed in 18 U.S.C. 3162(a)(1) and had not abused its discretion. The court also rejected petitioner's argument that the district court had improperly based its remedy on "proof of guilt" derived from petitioner's testimony at the suppression hearing. The court noted that the district court was required to consider the seriousness

of the offense pursuant to 18 U.S.C. 3162(a)(1), and that it could properly consider petitioner's testimony at the suppression hearing in so doing. In applying Section 3162(a)(1), the court said, the district judge "was not deciding [petitioner's] guilt or innocence." Pet. App. A12-A14.

ARGUMENT

1. Petitioner contends (Pet. 12-19) that the officers' on-the-scene search of the Jeep cannot be justified as a search incident to his arrest under *New York v. Belton*, 453 U.S. 454 (1981). Petitioner argues that the search was invalid because he was apprehended about a block from the Jeep, and the search occurred only after he was returned to the Jeep's vicinity. That contention is without merit.

In *Belton*, this Court established a bright-line rule to govern the validity of a search of an automobile, incident to the arrest of one of its occupants. The Court noted that under *Chimel v. California*, 395 U.S. 752 (1969), police at the time of an arrest may search the area within an arrestee's immediate control in order to protect the arresting officers from weapons and to prevent the destruction of evidence. *Belton*, 453 U.S. at 457. The Court recognized, however, that the application of that rule had produced great uncertainty where the " 'area of immediate control of the arrestee' * * * arguably includes the interior of an automobile and the arrestee is its recent occupant." *Id.* at 460. In order to provide a "straightforward" and "workable" rule in that setting (*id.* at 459-460), the Court announced that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile," *id.* at 460 (footnotes omitted), and containers found therein, *id.* at 457-460.

In a wide variety of arrest situations, the courts of appeals have applied *Belton* with a view toward preserving the

clarity of its rule permitting the search of automobile passenger compartments. See *United States v. McKinnell*, 888 F.2d 669, 672-673 (10th Cir. 1989) ("The search remains a valid search incident to arrest even if it occurs after the suspect has been arrested, handcuffed, and placed outside of the vehicle."); *United States v. Edwards*, 885 F.2d 377, 383-384 (7th Cir. 1989); *United States v. Valiant*, 873 F.2d 205, 206-207 (8th Cir.), cert. denied, 110 S. Ct. 117 (1989); *United States v. White*, 871 F.2d 41, 44 (6th Cir. 1989) ("[O]ur consistent reading of *Belton* has been that, once a police officer has effected a valid arrest, that officer can search the area that is *or was* within the arrestee's control."); *United States v. Lorenzo*, 867 F.2d 561 (9th Cir. 1989) (per curiam); *United States v. Jorge*, 865 F.2d 6, 9-10 (1st Cir.), cert. denied, 109 S. Ct. 1762 (1989); *United States v. Cotton*, 751 F.2d 1146, 1148 (10th Cir. 1985); *United States v. McCrady*, 774 F.2d 868, 872 (8th Cir. 1985).¹ Likewise, the court of appeals in this case properly applied the bright-line rule of *Belton* to the unique facts before it.

Petitioner assaulted an officer shortly after getting out of the Jeep. He fled, but was promptly captured one block

¹ A few cases involving distinguishable facts have found *Belton* inapplicable. In *United States v. Vasey*, 834 F.2d 782, 785-788 (9th Cir. 1987), the court found that a search was not contemporaneous under *Belton* when, unlike in this case, 30 or 45 minutes had elapsed between the placement of defendant in rear of police car and the search. Cf. *United States v. Lorenzo*, *supra*. In *United States v. Fafowora*, 865 F.2d 360 (D.C. Cir. 1989), the arrest took place when the arrestees were walking away from a car that they had parked following a chase by DEA agents, 865 F.2d at 361, and the court held that "the passenger compartment of the [car] was not within the 'immediate surrounding area' into which [the arrestees] might have reached at the time the DEA agents caught up with them," *id.* at 362. Here, in contrast, the court of appeals found that at the time of the search, petitioner's "proximity to the jeep" made its search "appropriate to protect all persons as well as evidentiary items." Pet. App. A9.

away. The officers conducted a pat-down search of petitioner and immediately returned him to the scene of the assault so that they could get medical assistance for the injured officer. Once back at the scene of the assault, the officers conducted a more thorough search of petitioner's person and the interior of the nearby Jeep. Those searches were part of a single unbroken process of arresting petitioner, a process that necessarily included returning petitioner to the site of the assault so that the officers could attend to Sergeant Martin. Because petitioner was under a lawful custodial arrest, and because he had occupied the Jeep immediately before his arrest, the search was proper under *Belton*.

Petitioner errs in contending (Pet. 13-14) that the search was improper because he was returned to the Jeep after having been formally placed under arrest a block away. As both courts below found, the officers acted reasonably in returning petitioner to the scene of the assault, because Sergeant Martin needed assistance. Once the officials had returned to the scene, the rationale of *Belton* was fully applicable. The importance of an immediate search was heightened by petitioner's demonstrated propensity for violence and the fact that he was being held in the vicinity of the car while his companion, Maldonado, was still at large. This was not a case, as the court of appeals expressly noted (Pet. App. A9), where the officers brought an arrestee to a vehicle as a pretext for searching it.²

² Citing *Chambers v. Maroney*, 399 U.S. 42 (1970), petitioner argues (Pet. 13) that because his arrest and the search of the Jeep were not simultaneous, the search cannot be sustained as incident to his arrest. The court of appeals, however, specifically rejected the argument that "the delay between [petitioner's] capture and the initial pat-down and the subsequent search of the vehicle was significant enough to destroy [its] 'nearly contemporaneous' aspect." Pet. App. A9. Only a few minutes elapsed between petitioner's apprehension and the search.

Even if the search of the Jeep was unjustified as a search incident to petitioner's arrest, the evidence found in the Jeep was still admissible. In an alternative holding, the court of appeals ruled that the officers would have inevitably discovered the cocaine in the Jeep's passenger compartment during a routine inventory search at the DEA garage. Pet. App. A10-A11 n.2. That holding was correct.

Following petitioner's arrest, the officers had a clear need to impound the Jeep. Neither petitioner nor Maldonado was in a position to take custody of the tagless vehicle: petitioner was under arrest for assaulting Sergeant Martin and Maldonado had absconded. Having impounded the Jeep, the officers were entitled to inventory its contents. *Colorado v. Bertine*, 479 U.S. 367 (1987); *South Dakota v. Opperman*, 428 U.S. 364 (1976). In the process, they obviously would have discovered the package of cocaine that was lying on the back seat beneath petitioner's jacket.³ Thus, under *Nix v. Williams*, 467 U.S. 431 (1984), the evidence found in the Jeep was admissible regardless of the validity of the arrest-scene search. Accord *United States v. Andrade*, 784 F.2d 1431, 1433 (9th Cir. 1986).

2. Petitioner next argues (Pet. 21-23) that the indictment should have been dismissed with prejudice because of a violation of the Speedy Trial Act, 18 U.S.C. 3161 *et seq.* In determining whether to dismiss an indictment with or without prejudice, the court must consider the seriousness of the offense, the facts and circumstances of the case leading to the dismissal, and the impact of a reprosecution on the administration of the Speedy Trial Act and on the

³ That discovery, in turn, would have permitted the full-scale search of the Jeep that resulted in the discovery of additional cocaine in the concealed compartment beneath the carpeting. See *United States v. Ross*, 456 U.S. 798 (1982) (permitting warrantless search of all areas of a car that may contain items that the police have probable cause to believe are there).

administration of justice. See *United States v. Taylor*, 108 S. Ct. 2413, 2419 (1988); 18 U.S.C. 3162(a)(1). The application of those factors is committed to the district court's discretion. *Ibid.* The district court did not abuse its discretion in this case when it dismissed petitioner's indictment without prejudice, permitting the government to reinstate the charges and ultimately convict petitioner.

Petitioner's offense — possession of 3438.9 grams of cocaine with intent to distribute it — was unquestionably a serious one, weighing heavily in favor of dismissal without prejudice. In addition, the circumstances of the dismissal supported reprosecution. The cause of the speedy trial violation was the district court's misunderstanding of the extent to which pretrial motion delay is excluded under the Act. See *Henderson v. United States*, 476 U.S. 321, 326-330 (1986) (excludable delay attributable to a pretrial motion usually ends 30 days after the hearing is completed). Petitioner did not ask the court to rule more promptly on his pending motion, and there was no bad faith or intentional delay on the part of the government. Finally, petitioner was not prejudiced by the delay. Pet. App. A12-A13. Those factors fully justified the district court's decision.

Petitioner also argues (Pet. 19-21) that the district court should not have considered his suppression-hearing testimony in applying Section 3162(a)(1), because such consideration forces a defendant into a "Hobson's choice"; according to petitioner, a defendant in such a position may forgo his right to a speedy trial if he chooses to assert his Fourth Amendment rights. Pet. 21. There is no merit to that claim. The Court has held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be used against him at trial *on the issue of guilt* unless he makes no objection." *Simmons v. United States*, 390 U.S. 377, 394 (1968) (emphasis added). That rule has

never been extended to a case in which the government's subsequent use of suppression-hearing testimony does not involve establishing guilt. Compare *United States v. Salvucci*, 448 U.S. 83, 93-94 (1980) ("This Court has not decided whether *Simmons* precludes the use of a defendant's testimony at a suppression hearing to impeach his testimony at trial."). Petitioner's guilt or innocence was not at issue in determining whether the offense with which he was charged was "serious" for purposes of the Speedy Trial Act; hence, the conflict of constitutional interests identified by *Simmons* is not present here. Cf. *United States v. Baker*, 850 F.2d 1365, 1370 (9th Cir. 1988) (*Simmons* does not bar government from obtaining a superseding indictment based on defendant's testimony at trial which ends in a mistrial); *United States v. Hernandez*, 779 F.2d 227 (5th Cir. 1985) (*Simmons* does not bar the use of suppression-hearing testimony at sentencing), cert. denied, 476 U.S. 1119 (1986).⁴

Nor does the rationale of *Simmons* aid petitioner. Petitioner was in no sense placed in the type of dilemma

⁴ The courts of appeals have also declined to apply *Simmons* to the use of pretrial testimony at the trial itself, where, as in this case, there is no showing that "one constitutional right [must] be surrendered in order to assert another." 390 U.S. at 394. See *United States v. Boruff*, 870 F.2d 316 (5th Cir. 1989) (*Simmons* inapplicable to bar government's use at trial of testimony of witness called by defendant in suppression hearing), cert. denied, 110 S. Ct. 160 (1989); *United States v. Clawson*, 831 F.2d 909, 912 (9th Cir. 1987) (*Simmons* does not bar use at trial of defendant's affidavit for return of property voluntarily filed in state court), cert. denied, 109 S. Ct. 303 (1988); *United States v. Dohm*, 618 F.2d 1169, 1174 (5th Cir. 1980) (en banc) (*Simmons* does not bar the use at trial of the defendant's testimony in bail hearings). Compare *United States v. Kahan*, 415 U.S. 239, 243 (1974) (per curiam) (defendant who perjured himself at a pretrial hearing to obtain appointed counsel could not invoke *Simmons* to bar the use of that testimony at trial, because the defendant did not surrender "what was 'believed' * * * to be a 'valid' constitutional claim").

Simmons sought to avoid. In *Simmons*, the Court observed that "a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof * * * necessary to assert a Fourth Amendment claim." 390 U.S. at 392-393. When petitioner testified at his suppression hearing, however, he could not possibly have "known" that there might be a future Speedy Trial Act violation. That violation occurred only when the district court failed to decide his suppression motion within 30 days of the hearing. Consequently, unlike the defendant in *Simmons*, petitioner was not forced to choose between testifying at his suppression hearing and giving up some known right.⁵

At all events, the district court's consideration of petitioner's testimony would not have made a difference in the court's ruling on the remedy issue. The seriousness of petitioner's offense was manifest from the charges in the indictment and from the seizure of the cocaine itself. Petitioner's admission at the suppression hearing that he possessed a large quantity of cocaine was merely cumulative of other information before the court. Consequently, even if petitioner's admission had not been considered, the outcome of his speedy trial motion would have been the same. Any error in the district court's consideration of petitioner's testimony was therefore harmless.

⁵ Nor would any future defendant have reason to be deterred from testifying in a pretrial hearing because of a speculative, future Speedy Trial Act violation. The possibility of such an event coming to pass is simply too remote.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JANUARY 1990